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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: MAY 30 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences. The petitioner seeks employment as an associate physician at the [redacted] At the time he filed the petition, the petitioner was a fellow in neonatology at [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel, a witness letter, and supporting exhibits.

In this decision, the term "prior counsel" shall refer to [redacted] who represented the petitioner at the time the petitioner filed the petition. The term "counsel" shall refer to the present attorney of record.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner claims eligibility for classification as an alien of exceptional ability in the sciences. The director found that the petitioner, whose occupation requires at least a bachelor's degree and who holds a medical degree, qualifies as a member of the professions holding an advanced degree. An additional determination regarding the petitioner's claim of exceptional ability would have no

effect on the outcome of the decision, and is therefore unnecessary. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on June 21, 2010. In an accompanying statement, prior counsel stated:

> [The petitioner] is a pediatric physician, sub-specializing in neonatal medicine, with exceptional abilities in Pediatric and Neonatology research as well as outstanding clinical skills. He is one of the few that can boast of groundbreaking research as it pertains to feeding scores and the correlation to neurodevelopmental outcomes in preterm infants based on the interpretation of amplification signals and analysis of rhythms obtained from the Grass Model 12 Neurodata Acquisition System. . . .
>
> The anticipated findings from this research would be very important in early identification of babies with feeding problems and early institution of corrective measures. . . .

Prior counsel did not explain how one could already know the importance of the findings if those results were merely "anticipated" and, thus, not yet confirmed.

Prior counsel stated that the petitioner "**has dedicated his research efforts and published several articles** on areas that can be instrumental in decreasing the burden of costs that preterm infants place on the health care system and more importantly on improving the health outcomes for these preterm infants" (emphasis in original). The assertion that the petitioner's work "can be instrumental in decreasing . . . costs" does not show that his efforts to date have, in fact, had any significant effect.

The petitioner's *curriculum vitae* identified three published works, all of them abstracts of poster presentations. All of the petitioner's published research took place at [redacted] The petitioner stated that he continued to engage in research after leaving that hospital, but there is no evidence of any subsequent publications.

The petitioner submitted eight witness letters, six of them from witnesses who have worked with the petitioner at [redacted] praised the petitioner's "clinical skills" and said that he "is an active teacher of young physicians in the Neonatal ICU" (intensive care unit). Clinical practice and teaching duties are inherently local in scope. *See NYSDOT*, 22 I&N Dec. 217 n.3. Regarding the petitioner's research work, [redacted] stated:

> [The petitioner's] research efforts in the area of infant feeding are also of importance in predicting neurological outcomes in sick preterm infants, a group at very high risk for developmental delay. [The petitioner] is working with me on a study of the biorhythms of infant feeding. . . . These biorhythms and their interrelationships have been shown to follow a predictable developmental pattern in preterm infants. Using these patterns, [the petitioner] is studying whether the quantitative biorhythms will predict short- and long-term neurodevelopmental and feeding outcomes in groups of high-risk infants. This will be important in identifying the babies at highest risk for

long-term problems, and will help direct the allocation support resources to the most appropriate children.

[redacted] stated:

> [T]he research project [the petitioner] is currently working on has the potential to impact thousands of American children each year. . . . [The petitioner] is presently devising a feeding score, a first of its kind in the world. His hypothesis is that the feeding score will correlate with neurodevelopmental outcome at one and two years of age using the Bailey Developmental Scale. The anticipated findings from this research would be very important in early identification of babies with feeding problems and early institution of corrective measures which would ultimately reduce the number of days spent in the NICU and overall cost of preterm baby care in the USA. The study would also allow early identification of babies at risk for lifelong disabilities hence early institution of therapies that may . . . improve quality of life, decrease the burden placed on caregivers . . . and, ultimately lead to a reduction in the $50billion cost of post NICU care.

[redacted], now an assistant professor at the [redacted] was previously the petitioner's "senior Fellow" at [redacted] described the petitioner's research in virtually the same language used in [redacted] letter, including the term "[redacted]" expressed as one word.

[redacted], assistant professor at [redacted], "supervised [the petitioner] for the past two years as a faculty mentor." [redacted] called the petitioner "an excellent teacher" whose "patient care skills are outstanding" and who "already has a strong track record in research." Regarding the petitioner's research project, [redacted] stated that "his initial preliminary work shows great promise." [redacted] wrote his letter on June 8, 2010. Thus, the petitioner's feeding score project was still in its "initial preliminary" stage the month that the petitioner filed the petition.

[redacted], associate professor at [redacted] called the petitioner "an astute clinician who has made innumerable significant contributions to his specialty," but identified none of those contributions. [redacted] stated that the petitioner's earlier research into retinopathy of prematurity, "presently the commonest cause of childhood blindness in the United States . . . will help improve our understanding of the problem and bring us a step closer to designing preventive measures," but did not elaborate as to how the petitioner's work has led researchers closer to those measures.

[redacted], a fellow in [redacted] stated that the petitioner "has been instrumental in quality improvement initiatives in the Division of Neonatology. Strategies he is developing have the potential to transform neonatal practice not only locally but also nationally." [redacted] did not identify these initiatives or strategies, or show that anyone has tried to implement them outside of [redacted]. Like some other witnesses, [redacted] praised the petitioner's attempts to

develop neonatal feeding scores, and predicted their transformative impact even though the effort was still ongoing at the time of the letter.

The remaining two witnesses knew the petitioner during his earlier training at [redacted], assistant professor at the [redacted] signed a letter indicating that the petitioner's "current research work . . . would allow early identification of preterm infants at risk for lifelong disabilities. It will provide evidence for early institution of therapies that may . . . improve the quality of life and decrease the burden placed on caregivers . . . and, ultimately lead to a reduction in the $50billion cost of post NICU care." The similarity of wording with the letters from [redacted] is evident.

[redacted] worked with the petitioner "between July 2005 [and] June 2008." [redacted] stated that the petitioner's "research on hyperglycemia as a risk factor for retinopathy of prematurity and osteopenia of prematurity was not only well received, but his poster presentation was logical and fantastic."

On July 23, 2010, the director issued a request for evidence, instructing the petitioner to submit additional documentation to establish eligibility under the *NYSDOT* guidelines. In response, the petitioner submitted seven additional witness letters. Two of the letters are from prior witnesses at [redacted] stated that the petitioner's

> previous work on the role of potassium on osteopenia of prematurity is novel and of note, and may affect the way osteopenia of prematurity is managed in premature neonates around the world. His current work in developing a feeding score based on the biorhythms of feeding and the potential for predicting neurological outcomes in sick preterm infants would also represent a significant advance in the field.

[redacted] offered a similar statement:

> [The petitioner's] previous work on Role of serum potassium on osteopenia of prematurity is unique and ground-breaking, and may affect the way Osteopenia of prematurity of prematurity [*sic*] is managed in premature neonates, the clinical impact of his research is international in scope. This is truly an extraordinary accomplishment.

[redacted] noted the petitioner's invitation to present his work at the 2011 Annual Pediatric Society Conference, and claimed that this invitation is "an international honor given to only [a] few with exceptional research of high clinical significance." The record contains nothing from the society to support this characterization of the invitation. Furthermore, the record does not show that the petitioner received that invitation before the petition's filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after

the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

[redacted] where the petitioner was a clinical tutor from 2003 to 2005, stated that the petitioner's "abilities qualify him as [an] extraordinary physician" but offered few details other than the names of institutions where the petitioner has trained, and the general assertion that the petitioner has published and presented his work.

[redacted] stated that the petitioner "has made innumerable significant contributions in serving the people of mid Michigan by working at the [redacted] where he has consistently been placed in leading and critical roles for distinguished medical abilities." [redacted] praised the petitioner as "both a leader and a pioneer in the field of medicine," but provided no details except when discussing the petitioner's duties as a neonatal resuscitation instructor. Even then, [redacted] did not indicate that the petitioner developed or improved the techniques that he taught. [redacted] merely emphasized the overall importance of the skill.

[redacted] credited the petitioner with "a series of exciting and groundbreaking results, which have greatly expanded scientific knowledge" in the field of pediatric medicine. [redacted] stated: "What truly places [the petitioner] at the very top of his field is the impact that his research work has had," but [redacted] cited no evidence of that claimed impact.

[redacted] stated that the petitioner "is regarded in the medical community as invaluable and rare," and "is regarded as unique in the field of pediatrics and neonatology." These passively-worded sentences do not say who regards the petitioner in the manner described; they are simply vague claims about an ill-defined reputation. [redacted] listed several of the petitioner's appointments and professional memberships, claiming each one to be a high honor that demonstrates the petitioner's reputation in the field but offering no evidence to support such claims. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

[redacted] stated that the petitioner's "unique research on Effect of emergency contraception on adolescent sexual and contraceptive behavior . . . will in their [*sic*] years to come change the way physician In the United states [*sic*] and worldwide counsel adolescents on contraceptive use." Like other witnesses' commentary on the petitioner's later research, this assertion amounts to speculation about the eventual impact of the petitioner's work.

The director, in the request for evidence, had requested "documentary evidence" of that impact, but the petitioner provided none, instead relying entirely on witness letters. The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have received consideration above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795.

The letters considered above primarily contain bare assertions that the petitioner is an accomplished physician and researcher, without specifically identifying innovations that have influenced the field. Predictions of the future influence of unfinished projects cannot meet the petitioner's burden of proof.

In terms of the national scope of the petitioner's intended work, several witnesses observed that medical research for publication is national in scope. All of the petitioner's research work, however, has taken place in the context of ongoing university training. The petitioner submitted nothing to show that he would continue to engage in research at the [redacted]

A copy of the "Associate Physician Agreement" between the petitioner and the [redacted] indicates that the petitioner "agrees to devote his/her entire professional time, ability, and attention to this employment and agrees to perform medical services . . . for the benefit of the [redacted] and its patients." The clinic agreed to "provide . . . all necessary . . . medical equipment, drugs, supplies, furniture and fixtures . . . as are necessary for the effective practice of medicine"; the clinic did not agree to furnish supplies for medical research. The agreement contains no mention of medical research as part of the petitioner's intended duties. Rather, it strongly implies that the petitioner is expected to work exclusively as a physician, providing patient care.

The director denied the petition on August 17, 2011. The director acknowledged that "[t]he petitioner appears to be well-qualified to function as a physician," but found that the petitioner had not shown that his intended duties at the [redacted] are national in scope. The director also

questioned the extent of the petitioner's involvement in prior research, stating that the petitioner had not documented his publication of articles or presentations at conferences.

On appeal, counsel correctly observes that the petitioner had provided copies of published research materials. These materials appear to be abstracts rather than full-length articles, but the point stands that the petitioner has documented his past involvement in medical research. To this extent, the director's decision contains an error. The AAO finds, however, that this error did not result in an incorrect decision. The director was correct in noting that the petitioner's duties at the [redacted], according to the agreement in the record, relate exclusively to patient care.

Counsel, on appeal, discusses the petitioner's past research work at length. Past research, however, does not prospectively benefit the United States. The point of discussing past research is to demonstrate that the petitioner has already established a track record of achievement and impact on his field, from which it is reasonable to extrapolate future achievements of similar importance. If the petitioner will not continue to perform research, then the observation that research has national scope is true but irrelevant. As for the impact of the petitioner's past research, the record is devoid of independent documentary evidence that would corroborate the witness letters solicited to support the petition.

One more such letter accompanies the appeal. [redacted] praised the petitioner's "innovative research work" which "has resulted in the development of a specific management technique for this feeding complication in premature babies." The AAO notes that, while the petitioner's initial submission described a then-ongoing project regarding feeding rhythms, the appeal contains no evidence that this research ever resulted in any published article. If the petitioner developed "a specific management technique" that is now in widespread use, then there ought to be concrete evidence to that effect, beyond letters that the petitioner asked colleagues to write on his behalf.

Counsel contends that the petitioner's "designation as a Fellow of the American Academy of Pediatrics (AAP)" and "as a Board Certified Diplomate of the American Board of Pediatrics" (ABP) serve to demonstrate "the National Scope of his Expertise in the Field." The appeal includes no evidence to support counsel's claims about the significance of the petitioner's board certification and status as an AAP fellow. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In materials submitted on appeal, the only listed requirement to become a fellow of the AAP is board certification by the APB or certain other medical boards. The requirements for ABP certification are:

- GRADUATION from an accredited medical school. . . .
- COMPLETION of three years of training in pediatrics in an accredited residency program. . . .
- VERIFICATION of satisfactory completion of residency training. . . .

- POSSESSION of a valid, unrestricted state license to practice medicine.
- SUCCESSFUL completion of a comprehensive one-day written examination.

(Capitalization in original.) The materials indicate: "Although ABP certification is voluntary, nearly all qualified pediatricians seek this recognition." The record indicates that the AAP is "an organization of 60,000 pediatricians." The size of this organization – consisting entirely of board-certified pediatricians – does not tend to support counsel's claim that AAP fellowship and ABP certification are special honors or distinctions in the field. Rather, it appears that ABP certification is a basic validation of medical credentials which more or less automatically entitles one to apply for AAP fellowship.

While counsel is correct that the director disregarded the petitioner's research work, counsel has not shown that this error led to the denial of a petition that otherwise should have been approved. The director correctly raised the point that the petitioner's prospective employment does not appear to involve any research. Counsel, on appeal, has not addressed this point, instead offering claims about the importance of the petitioner's now-completed past research at [redacted]

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The AAO notes that an employer filed a Form I-140 petition, including an approved labor certification, on the alien's behalf on April 24, 2012. The director approved that petition on May 9, 2012. Thus, the alien is the beneficiary of an approved petition, granting him the same classification that he sought in the present proceeding. There is no longer any question of whether an employer could obtain a labor certification for him; USCIS records show that an employer could, and did, do so.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.